

Served: June 24, 1992

NTSB Order No. EA-3592

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 29th day of May, 1992

BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

SE-9451

ROBERT C. TULLIUS,

Respondent.

OPINION AND ORDER

Respondent has appealed from the initial decision Administrative Law Judge Joyce Capps issued at the conclusion of an evidentiary hearing held March 27, 1989.<sup>1</sup> The law judge affirmed an order the Administrator issued June 22, 1988, charging respondent with the operation of an impermissibly low flight in violation of sections 91.79(b) and 91.9 of the Federal Aviation Regulations (FAR).<sup>2</sup> However, the law judge modified the sanction sought by the

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<sup>1</sup> A copy of the oral initial decision, an excerpt from the transcript, is attached.

<sup>2</sup> On the date at issue in the Administrator's order, FAR sections 91.79(b) and 91.9 read as follows:

Administrator, a 60-day suspension of respondent's private pilot certificate, to one of 45 days.<sup>3</sup> After reviewing the testimony and the other evidence of record, the Board has determined that the initial decision should be affirmed.

The law judge found credible the testimony of a police officer who was patrolling the streets of Hanover, PA, in his cruiser, in a residential area, who testified that he saw a plane make three passes, east to west, and west to east, over an area he identified on a town map (an area of two-story residences, a hospital and a school) at an altitude he judged to be as low as 200 feet above the ground, at one point descending below a line of trees that he also identified on the town map. The police officer met respondent at the Devener Airport when respondent landed in the plane seen over  
(..continued)

"§ 91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

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(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>3</sup> The Administrator did not appeal the reduction.

the town. The police officer testified that, when he advised respondent that he was flying low over a residential area, respondent informed him that he was signalling friends to pick him up at the airport. The officer observed that, later, a station wagon arrived at the airport and picked up respondent and his passenger.

Respondent contends on appeal that the Administrator failed to prove that he was not in the standard pattern for Devener Airport when the police officer saw him fly low, and he further contends that he would not have been in the area where the police officer identified his low flight for the purpose of notifying his friends that he had arrived in the area. Respondent points out that the area where the officer fixed the low flight is 11 or 12 blocks south of the home of his friends (Brandy Court).

The law judge found, however, that respondent flew low, away from the area where the standard landing pattern would begin, and, as respondent argues, south of Brandy Court. She stated, "I think he....went further south than he had intended in order to fly over that house and I think he did exactly what...the [police officer] testified the aircraft did." (ID at 92). That factual finding was based on a credibility determination.

Respondent's friends' home (Brandy Court) is about ten blocks north of the area that the police officer identified as the area over which respondent circled; however, it is a short distance from the airport and, if we are to believe respondent's diagram (Exh. R-1), on the outer edge of the crosswind leg of the standard pattern.

However, the testimony was that the low flight took place south of Brandy Court. The police officer testified that he has never seen a plane fly over the area where he identified respondent's low flight, either before or since.

Respondent provided the testimony of his passenger and his friend whose wife made the short trip to the airport in the station wagon. He testified on his own behalf. To the extent that he testified that he did not operate below an altitude of 1,000 feet in any area outside the standard traffic pattern, the law judge did not find him credible.

In the Board's view, the evidence supports the law judge's factual finding that respondent was not in the standard traffic pattern but was some distance from the airport when he flew low. We do not find that her second factual finding, that respondent was signalling his friends to come to the airport, is incompatible with her first, that respondent flew low in the area identified by the police officer. She discussed the fact that respondent's recitation of events and the police officer's, whom she found credible, were "diametrically opposed." She also noted that, in her view, respondent flew "further south than he intended," thereby demonstrating that she took into consideration the fact that respondent's low flight over the town 10 blocks south of his friends' home was not compatible with signalling them of his arrival.

We also find no merit to respondent's challenge to the police officer's ability to judge aircraft location in relation to streets

and trees in the town where, he testified, he has been a police officer for 17 years. As the Administrator points out, the law judge was able to observe the demeanor of each witness, and, on matters of credibility, the Board defers to the trier of fact. Administrator v. Smith, Order EA-2438 (1987).

In sum, the Board finds that the Administrator carried his burden of proof, and sees no reason to disturb to law judge's findings that the eyewitness to low flight over a congested area was credible, the witness was qualified to testify in regard to what he saw, and the area where respondent flew too low (below 1,000 feet above the ground) in an area properly identified as "congested" was not in the standard traffic pattern for the Devener Airport.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge, and the initial decision are both affirmed; and
3. The 45-day suspension of respondent's private pilot certificate shall begin 30 days after service of this order.<sup>4</sup>

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>4</sup> For the purposes of this order, respondent must physically surrender his private pilot certificate to an appropriate representative of the FAA pursuant to FAR section 61.19(f).